

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP806

Cir. Ct. No. 2015CV4114

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. T. MICHAEL BARRETT,

PETITIONER-APPELLANT,

V.

**WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES
AND WISCONSIN REAL ESTATE EXAMINING BOARD,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. T. Michael Barrett¹ appeals from an order of the circuit court affirming a decision of the Real Estate Examining Board “denying his application for renewal of his real estate broker’s license after he was convicted of a felony.” Barrett alleges multiple constitutional violations. We affirm the circuit court.

BACKGROUND

¶2 Barrett became a licensed real estate broker in Wisconsin in 1980. Such licenses are renewed in December of even-numbered years. *See* WIS. STAT. § 440.08(2)(a)65 (2015-16).²

¶3 In February 2014, a jury convicted Barrett on one count of possession of a firearm silencer, a Class H felony contrary to WIS. STAT. § 941.298(2) (2013-14). According to the criminal complaint, a confidential informant had a series of recorded phone conversations with Barrett regarding the sale of two firearms. The informant told Barrett that one of the guns had a silencer attached. Barrett told the informant that the silencer was illegal, but he would meet the informant and look at the guns anyway. The pair met and the informant showed Barrett the guns. Barrett “specifically commented that the .22 caliber with the attached silencer was ‘highly, highly, highly, highly illegal’” and described it as a “‘a fricking hit man’s gun.’” Barrett put both guns into black plastic gun boxes but removed the silencer, stating, “‘I ain’t even going to put that in the same box That way they [the police] have to have a warrant to get in there on my

¹ Barrett, a licensed Wisconsin attorney, is representing himself.

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

way home.”” (Ellipses and bracket in original.) Barrett also told the informant, ““I put it in a metal box. They can’t x-ray that fucker without a warrant and then, uh, I can say, well, I was just going to destroy it for a client Then we’re protected by attorney-client privilege. They can never get the shit out of me.”” (Ellipses in original.)

¶4 In April 2014, newly created WIS. STAT. § 452.25(1) took effect. *See* 2013 Wis. Act 288, §§ 19, 20(1)(b). This law provides that “no applicant ... may be issued a [real estate] broker’s or salesperson’s license ... if the applicant has been convicted of a felony.” However, if the applicant “has completed the confinement portion of his or her sentence ... or [has been] released upon the completion of his or her sentence; and 3 years have elapsed ... the applicant may apply to the board for a determination as to whether the applicant is suitable to be granted a license[.]” WIS. STAT. § 452.25(1)(b).

¶5 Barrett’s December 2014 license renewal was originally processed and approved. Shortly thereafter, the Department of Safety and Professional Services³ notified Barrett that the renewal was processed in error, so the license had been unrenewed and expired. A follow-up letter explained the license renewal was denied because of the felony conviction.⁴

³ The Real Estate Examining Board operates under the umbrella of the Department of Safety and Professional Services. Both the Board and the Department are named as defendants in this matter. We will refer to them collectively as “the Department” subsequently throughout this opinion.

⁴ Barrett informs us that the Office of Lawyer Regulation also has an open disciplinary matter against him relative to the felony conviction. We are therefore forwarding a copy of this decision to that office.

¶6 Barrett requested an administrative review hearing. *See* WIS. ADMIN. CODE § SPS 1.07 (current through Aug. 2014). The request for a hearing was denied because, according to the Department, the request did not identify any mistake of law or fact and thus failed to comply with § SPS 1.07(3).

¶7 Barrett then petitioned the circuit court for a writ of *certiorari*. *See* WIS. STAT. § 227.52. The circuit court perceived Barrett to be making five distinct constitutional arguments. The circuit court said:

Mr. Barrett contends that the Board's decision to invoke WIS. STAT. § 452.25(1) and deny the renewal of his broker's license violates the constitution in five separate ways:

- Treating him differently from other brokers who have not been convicted of a felony violates his right to equal protection of the laws;
- Denying his license application without a hearing offends due process;
- Applying the statute in his circumstances renders it an *ex post facto* law;
- Likewise, it subjects him to double jeopardy; and
- The statute violates the Eighth Amendment proscription against cruel and unusual punishment.

The circuit court concluded that each challenge lacked merit, so it affirmed the non-renewal of Barrett's license.⁵ Barrett appeals.

⁵ The circuit court also noted that Barrett was not challenging whether the Department appropriately applied WIS. STAT. § 452.25(1) or whether its decision was appropriately supported by adequate evidence. *See Peace Lutheran Church & Acad. v. Village of Sussex*, 2001 WI App 139, ¶10, 246 Wis. 2d 502, 631 N.W.2d 229 (general *certiorari* standard of review).

DISCUSSION

¶8 On appeal, Barrett makes similar arguments to those made in the circuit court. He contends that: retroactive application of WIS. STAT. § 452.25(1) offends due process by improperly depriving him of a protected property interest in his broker’s license; he was denied equal protection because the statute “mak[es] a classification of persons convicted of felonies;” the lack of a predeprivation “or any other” hearing violates due process; and retroactive application of the statute violates the *Ex Post Facto* and Double Jeopardy Clauses as well as the Eighth Amendment’s prohibition on cruel and unusual punishment.

A. Standard of Review Generally

¶9 “The constitutionality of a statute is a question of law we review *de novo*.” *Aicher v. Wisconsin Patients Comp. Fund*, 2000 WI 98, ¶18, 237 Wis. 2d 99, 613 N.W.2d 849. Statutes are presumed constitutional, and a challenger must show unconstitutionality beyond a reasonable doubt. *Ferndon v. Wisconsin Patients Comp. Fund*, 2005 WI 125, ¶68, 284 Wis. 2d 573, 701 N.W.2d 440. Any doubts about a statute are resolved in favor of constitutionality. *See id.*

B. Retroactivity

¶10 Barrett first complains about the retroactive application of WIS. STAT. § 452.25 to his February 2014 conviction. Legislation is presumed to apply prospectively unless a retroactive intent is revealed by express language or necessary implication. *See Martin v. Richards*, 192 Wis. 2d 156, 199-200, 531 N.W.2d 70 (1995). Section 452.25 “first applie[d] to an applicant who renews a license or registration under ch. 452 ... on the effective date of this paragraph,” which was April 18, 2014. *See* 2013 Wis. Act 288, § 20(1)(b); WIS. STAT.

§ 991.11. While the statute applies prospectively to renewals, there is no temporal element specified for a disqualifying felony conviction. In other words, the statute has a retroactive effect because it encompasses convictions entered before the statute's effective date. *See Martin*, 192 Wis. 2d at 200.

¶11 Retroactive legislation enjoys a presumption of constitutionality, *see Matthies v. Positive Safety Mfg. Co.*, 2001 WI 82, ¶26, 244 Wis. 2d 720, 628 N.W.2d 842, but it must satisfy due process, *see Neiman v. American Nat'l Prop. & Cas. Co.*, 2000 WI 83, ¶14, 236 Wis. 2d 411, 613 N.W.2d 160. We apply a rational basis test when reviewing retroactive legislation. *See Matthies*, 244 Wis. 2d 720, ¶27. Specifically, we weigh the public interest served by the statute against the private interest it overturns, including any unfairness caused by the retroactivity. *See Neiman*, 236 Wis. 2d 411, ¶9.

¶12 Barrett complains that the retroactive application of WIS. STAT. § 452.25 deprived him of a protected property interest in his broker's license. However, "[t]he fact that a person is once licensed does not create a vested property right in the licensee[.]" *State ex rel. Week v. Wisconsin State Bd. of Exam'rs in Chiropractic*, 252 Wis. 32, 35, 30 N.W.2d 187 (1947). In any event, "merely identifying a substantive, or vested, property right is not dispositive for due process purposes." *Neiman*, 236 Wis. 2d 411, ¶14. We must still apply the rational basis test.

¶13 "That a legitimate local interest is at stake in the regulation of real estate ... brokers has been clearly established" in Wisconsin. *Chapman Co., Inc. v. Service Broad. Corp.*, 52 Wis. 2d 32, 42, 187 N.W.2d 794 (1971). Historically, regulation for the protection of the public became necessary to counter

“unscrupulous persons” buying and selling real estate “in an unethical and fraudulent manner.” See *id.* (citation omitted).

¶14 Though Barrett may not see a link between his felony and his ability to sell real estate, we do. Buying or selling a home represents one of the biggest, if not the biggest, investments an ordinary person might make in his or her lifetime. Both buyer and seller may turn to a real estate broker to help navigate that process. The three-year bar on licensing felons that begins once they are released to supervision or discharged from their sentence strikes a balance between preventing unscrupulous or unethical persons⁶ from conducting real estate transactions and permitting convicted brokers to resume their trade after completing some punishment and rehabilitation for their crime.⁷ The temporary, retroactive bar of WIS. STAT. § 452.25 does not violate due process.

C. Equal Protection

¶15 Barrett next complains that “making a classification of persons convicted of felonies ... denies those persons the equal protection of the law” over their fundamental liberty and property rights.

¶16 The Equal Protection Clause does not forbid classifications. See *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). “[U]nless a classification warrants some form of heightened review because it ... categorizes on the basis of an

⁶ Barrett’s expressed intention to use his other professional license—his law license—as a shield for his illegal possession of a silencer is not particularly scrupulous or ethical.

⁷ Relicensing is not automatic; after the three-year time period has passed, the broker may apply “for a determination as to whether the applicant is suitable to be granted a license.” WIS. STAT. § 452.25(1)(c).

inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.” *Id.*

¶17 Convicted felons are not a suspect class. *State v. Thomas*, 2004 WI App 115, ¶26, 274 Wis. 2d 513, 683 N.W.2d 497; *United States v. Wicks*, 132F.3d 383, 389 (7th Cir. 1997). Thus, the rational basis test applies. We also reiterate that there is no fundamental right to a broker’s license. *Week*, 252 Wis. at 35.

¶18 A classification satisfies the rational basis standard if it meets five criteria: (1) the classifications are based on substantial distinctions that make one class really different from another; (2) the classification must be germane to the law’s purpose; (3) the classification must not be based on only existing circumstances—that is, it must not preclude additions to the members of the class; (4) whatever class a law applies to, it must apply equally to each member thereof; and (5) the characteristics of each class should be so far different from those of other classes as to reasonably suggest the propriety of the legislation. *See Blake v. Jossart*, 2016 WI 57, ¶33, 370 Wis. 2d 1, 884 N.W.2d 484.

¶19 The temporary proscription against licensing convicted felons satisfies these factors. We note in particular that this test requires each member of the class—that is, each convicted felon—to be treated the same. It does not, as Barrett would like us to hold, require different treatment based on the felony of conviction.

D. Deprivation Hearings

¶20 Barrett complains that the lack of a hearing prior to rescinding his license renewal, or “any other” hearing, violates due process. We disagree. “The Supreme Court ‘has recognized, on many occasions, that where a State must act

quickly, or whether it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause.” *Hightower v. City of Boston*, 693 F.3d 61, 84 (1st Cir. 2012) (quoting *Gilbert v. Homar*, 520 U.S. 924, 930 (1997)). “The Court has ‘traditionally accorded the States great leeway in adopting summary procedures to protect public health and safety.’” *Hightower*, 693 F.3d at 85 (quoting *Mackey v. Montrym*, 443 U.S. 1, 17 (1979)). “In such circumstances, full predeprivation process is not required so long as ‘prompt postdeprivation review is available for correction of administrative error.’” *Hightower*, 693 F.3d at 85 (quoting *Mackey*, 443 U.S. at 13).

¶21 Because WIS. STAT. § 452.25 is intended to protect the public’s safety—although not precisely in the same manner as the firearm licensing scheme in *Hightower*—we do not believe due process is violated by the lack of a predeprivation process. And Barrett does not dispute that postdeprivation process was available.

¶22 Of course, Barrett’s postdeprivation review was denied without a hearing because he failed to satisfy the pleading requirements of WIS. ADMIN. CODE § SPS 1.07(3) (current through Aug. 2014). Barrett does not seriously attempt to show that the Department erred in this regard; he points only to a single factual “error”—the Department’s comment that he was convicted on April 18, 2014, when “the actual conviction was on February 21, 2014.” He cites to the judgment of conviction entered on June 27, 2014.

¶23 While it is true that the jury returned a verdict convicting Barrett on February 21, 2014, he was not sentenced until April 18, 2014. We are not persuaded that the Department erred in specifying the April date—no judgment of

conviction would have been entered until after the sentencing hearing.⁸ In any event, for purposes of our review, this would not be a reversible error: it is irrelevant whether the judgment of conviction was entered in February, April, or June, as all predate Barrett’s December 2014 license renewal period.⁹

E. Double Jeopardy, Ex Post Facto, and Cruel and Unusual Punishment

¶24 Finally, Barrett claims that WIS. STAT. § 452.25 violates the Double Jeopardy and *Ex Post Facto* Clauses of the constitution, as well as the prohibition on cruel and unusual punishment. We are not persuaded.

¶25 One thing the Double Jeopardy Clause protects against is multiple punishments for the same offense. See *State v. Derango*, 2000 WI 89, ¶26, 236 Wis. 2d 721, 613 N.W.2d 833. “Whether a statute is considered punishment is a finding of constitutional fact and is an issue of law.” *State v. McMaster*, 206 Wis. 2d 30, 36, 556 N.W.2d 673 (1996). Barrett has the burden of showing WIS. STAT. § 452.25 constitutes punishment. See *id.* The circuit court in this case concluded there is no double jeopardy problem because § 452.25 is not a criminal penalty but a civil remedy. We agree.

⁸ It is not evident from electronic docket entries whether a judgment of conviction was entered following the sentencing hearing on April 18, 2014, or a few days later on April 22, 2014; the June 27, 2014 judgment is an amended judgment.

⁹ We reject Barrett’s claim that he is “grandfathered” into some prior legislative scheme without WIS. STAT. § 452.25. Such argument is necessarily an assertion that he should be bound by the rules in place when he first obtained his license, which is absurd. See *Week v. Wisconsin State Bd. Of Exam’rs in Chiropractic*, 252 Wis. 32, 35, 30 N.W.2d 187 (1947) (“[A]dvancements in the trade or profession may require additional conditions to be complied with.”)

¶26 “[C]ivil sanctions can constitute punishment, [but] the analysis centers on whether the sanction is so extreme and so divorced from the Government’s damages and expenses as to constitute punishment to which jeopardy can attach.” *McMaster*, 206 Wis. 2d at 43 (two sets of quotation marks and citations omitted). In much the same way as the supreme court reasoned that administrative suspension of driving privileges is a civil remedial sanction that does not implicate double jeopardy notwithstanding some punitive effect, *see id.* at 46-50, so too do we conclude that non-renewal of a real estate broker’s license for a felony conviction does not run afoul of double jeopardy protections. As noted, regulation of the real estate trade exists to protect the public; WIS. STAT. § 452.25 is merely an extension of that goal.

¶27 The circuit court declined to consider Barrett’s claims of an *ex post facto* violation and cruel and unusual punishment, finding he had conceded them when he failed to refute the Department’s analysis on those two issues. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). Barrett does not address the circuit court’s forfeiture ruling, and we will not permit him to revive the issues on appeal.

F. Summary

¶28 We are unconvinced of any constitutional violations. The circuit court properly denied *certiorari* because the Department appropriately denied Barrett’s relicensure¹⁰ and his request for a hearing.

¹⁰ We note that Barrett’s three-year waiting period before seeking relicensure will end in August 2017.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

